Case No. 20-12407

United States Court of Appeals
for the
Eleventh Circuit

MARIO DEL VALLE, ENRIQUE FALLA, AND ANGELO POU, AS INDIVIDUALS AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiffs — Appellants,
v.
EXPEDIA GROUP, INC., HOTELS.COM L.P., HOTELS.COM GP, ORBITZ, LLC, BOOKING.COM B.V., BOOKING HOLDINGS INC.,
Defendants — Appellees.

On Appeal from a Final Order of Dismissal by the United States District Court for the Southern District of Florida, Case No. 19-cv-22619-RNS

APPELLANTS' REPLY BRIEF AND RESPONSE TO CRUISE LINES INTERNATIONAL ASSOCIATION'S AMICUS CURIAE

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CERTIFICATE OF INTERESTED PERSONS

Appellants Mario Del Valle, Enrique Falla, and Angelo Pou, plaintiffs below, on their own behalf and on behalf of a class of similarly-situated persons, certify—pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3—that the following persons and entities may have an interest in the outcome of this case:

1. AAE Travel Pte. Ltd. (Subsidiary of Appellee)
2. Agoda.com (Subsidiary of Appellee)
3. Aguila, M. Paula, Esq., (counsel for Appellants)
4. Akerman LLP (counsel for Appellees)
5. Analytical Systems Pty Ltd. (Subsidiary of Appellee)
6. Baker McKenzie (counsel for Appellees)
7. Booking Holdings Treasury Company (Subsidiary of Appellee)
8. Booking Holdings, Inc. (Appellee) [BKNG]
9. Booking.com B.V. (Appellee)
10. Booking.com Holding B.V. (Subsidiary of Appellee)
11. Booking.com Holdings B.V. (Subsidiary of Appellee)
12. Booking.com Ltd. (Subsidiary of Appellee)
13. BookingSuite (USA) Inc. (Subsidiary of Appellee)
14. Classic Vacations, LLC (Subsidiary of Appellee)

15. Coronado Pte Ltd. (Subsidiary of Appellee)
16. Cruise, LLC (Subsidiary of Appellee)
17. Del Valle, Mario (Appellant)
18. Dohop Ltd. (Subsidiary of Appellee)
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21. Ebookers Limited (Subsidiary of Appellee)
22. Egencia France SAS (Subsidiary of Appellee)
23. Egencia LLP (Subsidiary of Appellee)
24. Egencia UK Ltd. (Subsidiary of Appellee)
25. EXP Global Holdings, Inc. (Subsidiary of Appellee)
26. EXP Holdings Luxembourg S.A. (Subsidiary of Appellee)
27. Expedia Asia Holdings Mauritius (Subsidiary of Appellee)
28. Expedia do Barsil Agencia de Viagens e Turismo Ltda. (Subsidiary of Appellee)
29. Expedia Group, Inc. (Appellee) [EXPE]
30. Expedia Lodging Partner Services Sárl (Subsidiary of Appellee)
31. Expedia Southeast Asia Pte. Ltd. (Subsidiary of Appellee)
32. Expedia.com Limited (Subsidiary of Appellee)
33. Falla, Enrique (Appellant)

34. FareHarbor Holdings, Inc. (Subsidiary of Appellee)

35. Home Away Spain SL (Subsidiary of Appellee)

36. HomeAway Holding, Inc., (Subsidiary of Appellee)

37. HomeAway Netherlands Holdings B.V. (Subsidiary of Appellee)

38. HomeAway Sarl (Subsidiary of Appellee)

39. HomeAway UK Ltd. (Subsidiary of Appellee)

40. HomeAway.com, Inc. (Subsidiary of Appellee)

41. HotelClub Pty Ltd. (Subsidiary of Appellee)

42. Hotels.com GP (Appellee)

43. Hotels.com L.P. (Appellee)

44. Hotwire, Inc. (Subsidiary of Appellee)

45. HRN 99 Holdings, LLC (Subsidiary of Appellee)

46. Interactive Affiliate Network, LLC (Subsidiary of Appellee)

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55. OpenTable (Subsidiary of Appellee)

56. Orbitz Travel Insurance Services, LLC (Subsidiary of Appellee)

57. Orbitz Worldwide (UK) Limited (Subsidiary of Appellee)

58. Orbitz Worldwide, Inc., (Subsidiary of Appellee)

59. Orbitz Worlwide, LLC (Subsidiary of Appellee)

60. Orbitz, Inc. (Subsidiary of Appellee)

61. Orbitz, LLC (Appellee)

62. Pou, Angelo (Appellant)

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64. Priceline.com Europe Holdco Inc. (Subsidiary of Appellee)

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66. Priceline.com Mauritius Co. Ltd. (Subsidiary of Appellee)

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77. Sosa, Lolita, Esq. (counsel for Appellees)

78. Travelscape, LLC (Subsidiary of Appellee)

79. Travelweb LLC (Subsidiary of Appellee)

80. Trip Network, Inc. (Subsidiary of Appellee)

81. Trivago N.V. (Subsidiary of Appellee) [TRVG]

82. Vazquez, Manuel, Esq. (counsel for Appellants)

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84. Webre, Jane, Esq. (counsel for Appellees)

85. WWTE Travel S.á.r.l. (Subsidiary of Appellee)

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ARGUMENT

In the court below, plaintiffs/appellants amended their complaint to add appellees as defendants on January 17, 2020. D.E. 15. The Expedia Appellees' response was due March 23, 2020. D.E. 18. The Booking Appellees' response was due April 1, 2020. D.E. 21. Briefing on the motions to dismiss was completed on May 15, 2020. One week later, on May 22, 2020, the district court granted, with prejudice, *the first motion to dismiss submitted for decision* in this case, without a hearing or leave to amend. D.E. 71 (the "Order"). That dismissal was manifestly improper, turned a blind eye to adequately alleged facts that plainly demonstrated personal jurisdiction over appellees, and purported to rule, in a drive-by footnote (*id*. at 8, n.2), that amendment would be futile for two (of three) plaintiff/appellants, on grounds that weren't mentioned, let alone analyzed by the Order, apparently having to do with when and by whom claims were acquired or inherited.[1]

[1] The Order's makeweight footnote 2 on page 8 "noted" in dicta "that it would be futile for Angelo Pou (and possibly for Enrique Falla) to amend their complaint because they do not appear to have actionable ownership interests." Order at 8, note 2. This footnote could never support dismissal of the complaint, because there were *three plaintiffs* below, *not two*. The third (and lead) plaintiff, Mario Del Valle, became a U.S. citizen and inherited the claim years before the Helms Burton Act's effective date of March 12, 1996. D.E. 50 ("Comp." or "complaint") ¶¶ 22, 23. Lead plaintiff/appellant Del Valle alleged an actionable ownership under any reading of the statute, even the erroneous one that apparently undergirds the Order's dicta about the other two appellants' claims.

When, how, and by whom actionable claims had to have been acquired are issues of first impression presented by this and other cases under Title III of the Helms-Burton Act, 22 U.S.C. §§ 6081-6085 ("the Act"). The Order's makeweight footnote and improper dismissal with prejudice were rendered even more egregious by the Order's failure to note that lead plaintiff/appellant Del Valle's claim as alleged satisfied even the most restrictive (and improper) interpretation of those issues of first impression.

Appellees' briefs could not and did not blink away the Order's erroneous misapplication of Florida's long-arm statute, or its manifest abuse of discretion in denying leave to amend and dismissing the complaint with prejudice. Appellees fail to note that the complaint contained legally sufficient, unrebutted (and unrebuttable) factual allegations making out a *prima facie* case for specific jurisdiction under Florida's long-arm statute and the Due Process Clause.

Moreover, although the Order did not address standing, appellees' and the Amicus briefs grossly mischaracterize appellants' claims as if they were based on the Cuban government's confiscation of their properties, and not appellees' trafficking, which is plainly and expressly what the Act targets. As will be demonstrated below, the complaint adequately alleged both actual injury and standing, as well as facts showing that: (a) appellants owned "the claim[s]" to the confiscated properties before March 12, 1996; (b) appellees "knowingly and

intentionally" profited from the confiscated property, as required by the Act's definition of "traffics," 22 U.S.C. § 6023(A); (c) appellees' conduct falls outside the lawful-travel affirmative defense in the Act's definition of "traffics," 22 U.S.C. § 6023(13)(B)(iii); and (d) the confiscated properties satisfy the Act's definition of property.

The Order committed manifest error in dismissing the complaint for want of personal jurisdiction; its makeweight dicta about two (of three) named plaintiffs' ownership of claims had to have been based on an erroneous reading of the Act's plain language; and dismissal with prejudice was a docket-sweeping abuse of discretion. The Order should be reversed, and the complaint should be reinstated and sustained.

I. THE COMPLAINT'S UNREBUTTED FACTS ADEQUATELY ALLEGE A *PRIMA FACIE* CASE OF PERSONAL JURISDICTION AND THE DISTRICT COURT ERRED IN REFUSING TO EXERCISE JURISDICTION OVER APPELLEES

The complaint's legally sufficient allegations of long-arm jurisdiction shifted the burden to defendants to factually rebut them. *E.g., Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 856 (11th Cir. 1990) (applying *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989))**.** Appellees never could have factually rebutted appellants' long-arm allegations and didn't even try.

Because appellees failed to rebut legally sufficient allegations of doing business and committing a tort in Florida, the district court was required only to determine if the alleged minimum contacts satisfied the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which they plainly did. *E.g., Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1319 (11th Cir. 2004). Instead, the Order overlooked and ignored appellants' legally sufficient allegations and erroneously held that no personal jurisdiction existed.

A. Appellants Adequately Alleged That Appellees Carry on Business in Florida to Which This Action Relates

The complaint adequately alleged that appellees do business in Florida to which this action relates, under Fla. Stat § 48.193(1)(a)(1). That is all the Florida long-arm statute requires to trigger a minimum contacts analysis, unless a defendant can rebut the "doing business" allegations. Appellees never could have done so, and didn't even try.

Instead appellees argued below, and here, that merely maintaining a website accessible in Florida is insufficient. So what? This misdirection play relies on cases where defendants' "passive" websites provided only information, and no sales were made on those websites. That is plainly not what was alleged below, nor what actually is going on. *Appellees' entire business is based on their sale of hotel reservations on their websites. If it*

weren't for sales on their websites, appellees would have no businesses at all.

The complaint adequately alleged that appellees' websites are not only interactive, transactional websites accessible from Florida, but that appellees conduct business with, and make sales to, Floridians through those websites. Comp. at 3, ¶¶ 13, 15, 36, 39, 50, 58. This fact is undeniable, as the Expedia Appellees conceded in a related, pending case, where they abandoned their personal jurisdiction defense after responding to initial discovery.[2] They necessarily would have had to concede personal jurisdiction in this case, if they hadn't lucked out and the Order hadn't been issued before their discovery responses were due.

Appellees cite *RG Golf Warehouse, Inc. v. Golf Warehouse, Inc.*, 362 F. Supp. 3d 1226 (M.D. Fla. 2019), *Lemoine v. Wong*, 2017 WL 5127592 (S.D. Fla. 2017), and *Fraser v. Smith*, 594 F.3d 842 (11th Cir. 2010), to argue that merely having a website accessible in Florida does not support "doing business" long-arm jurisdiction. None of those cases have anything to do with this one, where the complaint did not allege "merely having a

[2] *See* Expedia's "Amended Notice of Waiver of Objections to Specific Personal Jurisdiction in This Case," *Mata v. Expedia, Inc., et al*., No. 19-cv-22529-CMA, D.E. 107 (S.D. Fla. Mar. 3, 2020) (currently stayed due to Covid-19).

website," but that (1) appellees' *entire business* is the making of sales of reservations on their websites, (2) such sales were made in Florida, and (3) included sales of reservations at hotels (the "Resorts") built on property stolen from appellees and their families (the "Properties") by the communist Castro regime.

In *RG Golf Warehouse*, unlike here, the plaintiff did not allege that the defendant even maintained an office in Florida or advertised to and solicited Florida customers. 362 F. Supp. 3d at 1236. The fact that that plaintiff operated an interactive website, by itself, was held insufficient by the court for a finding of "doing business" long-arm jurisdiction under Section 48.193(1)(a)(1). *Id*.

In *Lemoine*, unlike here, the complaint's jurisdictional allegations were rebutted by a defendant's affidavit. 2017 WL 5127592 at *3, *5. Further, although *Lemoine* held that a website accessible in Florida, standing alone, was insufficient to satisfy Section 48.193(1)(a)(1), it and the cases it cites involved defendants that did not actively solicit business in Florida. *Id.* In dispositive contrast, the complaint below expressly alleged that appellees actively solicit business in Florida through emails and follow-up emails sent to targeted Floridians, which expressly promote appellees' websites and solicit sales of reservations at the Resorts. Comp. ¶ 15.

The website discussed in *Fraser* contained only local contact information and descriptions of the company's services. 594 F.3d at 844-45. Unlike that website, appellees' websites here are fully interactive, are intended and used to solicit and induce consumers, including Floridians, to search and pay for reservations at the Resorts. Comp. ¶ 13.

But far more was alleged below than the mere existence of an interactive website accessible from Florida and soliciting business from Floridians. The complaint also alleged that: appellees **(1)** have offices in Florida (Comp. ¶ 16); **(2)** send direct solicitations to Floridians *(id*. ¶ 15(b) (emails soliciting sales)); **(3)** made sales of reservations, including at the Resorts, to Floridians (*id*. ¶¶ 36, 39 (appellees "solicit and accept reservations from U.S. residents, including Florida residents.")); and that **(4)** a substantial percentage of appellees' revenue comes from Florida (*id.* ¶ 16).[3] Further, in briefing the motions to dismiss, appellants also expressly requested that the district court take judicial notice of appellees' longstanding registrations to do business in Florida. Omnibus Opposition to Defendants' Motions to Dismiss [D.E. 64] ("Omn. Opp.") at 8.

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[3] Appellees argue that allegations on information and belief are legally insufficient, citing *Cortazar v. CA Ventures, LLC*, 2019 U.S. Dist. LEXIS 139286 (S.D. Fla. 2019). Neither that case nor any other supports this theory. The *Cortazar* defendant factually rebutted plaintiff's allegations on information and belief with affidavits. *Id.* at *6-7. Nothing of the sort was even attempted here, because appellees would have had to lie under oath to do so.

The Booking Appellees here argue that allegations of their communications sent directly to Floridians in Florida to promote their website and sell reservations at the Resorts are legally insufficient, on the notion that promoting a website is not the equivalent of "benefiting from confiscated property," which thus could not support asserting personal jurisdiction. *See* Booking's Brief ("BB") at 29-33. This ridiculous argument again ignores the plain fact that appellees' internet sales of reservations at the Resorts were expressly alleged, and were undeniably made on appellees' websites. Every single email appellees sent to Floridians was sent to induce or manage appellees' sales of reservations at hotels, including the Resorts. Some other case might involve merely "passive" websites that provided "information only," which were themselves promoted by emails sent to Floridians, but this case does not and never did.

Equally unfounded is the Expedia Appellees' theory that the complaint failed to allege claims arising from their Florida contacts under § 48.193(1)(a)(1). They claim the complaint's allegation that a "substantial part of the [defendants'] business and revenue derives from their Florida offices" is irrelevant, arguing that the complaint did not allege a claim "arising from" the business conducted by their Florida offices. See Expedia's Brief ("EB") at 16-17. This is nonsense. Trafficking under the Act is expressly defined to include benefiting from trafficking in confiscated properties, which is exactly what the complaint

accurately alleged that appellees did every hour of every day. 22 U.S.C. § 6023(13)(A)(ii). Query if there ever could be a more obvious example of trafficking than offering to rent or sell confiscated property.

Moreover, the complaint expressly alleged that Expedia (and Booking) made money from their internet sales of reservations at hotels built on stolen properties. Again, this allegation cannot be truthfully denied, period, full stop. Word games could be (and still are being) played, only because the lower court ruled before appellees' discovery responses were due. Because courts often consider a defendant's revenue, and the percentage of its total revenue, made from the business in Florida out of which a claim arises, Expedia's Florida revenue is directly relevant to doing-business (and minimum-contacts) analysis.

In sum, the complaint adequately alleged "doing business" long-arm jurisdiction under Fla. Stat. § 48.193(1)(a)(1), based on appellees' case-related Florida activity. Those allegations and that activity plainly also satisfied minimum contacts, as we further demonstrate in Section I (C), infra.

B. Appellants Adequately Alleged That Appellees Committed a Tortious Act in Florida

Trafficking in violation of title III, like other statutory torts, subjects the trafficker to personal long-arm jurisdiction for committing a tort in Florida. *See, e.g., Koch v. Royal Wine Merchants, Ltd.*, 847 F. Supp. 2d 1370, 1380-81 (S.D. Fla. 2012) (FDUTPA violation); *Foreign Imported Prods. & Pub. Inc. v. Grupo*

Indus. Hotelero S.A., 2008 WL 4724495, at *6 (S.D. Fla. 2008) (federal Copyright Act violation); *Keim v. ADF MidAtlantic, LLC*, 199 F. Supp. 3d 1362, 1367 (S.D. Fla. 2016) (TCPA violation). The Booking Appellants argue that a statutory cause of action is not a tort for purposes of authorizing personal jurisdiction under the long-arm statute, but rely on inapposite cases involving statutory bad faith and fraudulent conveyance claims.[4] They also argue that even if a Helms-Burton violation is considered a tort, they didn't commit it in Florida.

Title III of the Act subjects a defendant to liability for trafficking if it "knowingly and intentionally . . . engages in a commercial activity using or otherwise benefiting from confiscated property . . . ." 22 U.S.C. § 6023(13). The complaint accurately and adequately alleged that appellees are intentionally engaged in commercial activity, acting as travel agents and selling room reservations at the Resorts. It also alleged that appellees derive a direct financial benefit from advertising, facilitating and selling room reservations at the Resorts. There could hardly be a better illustration of commercial activity.

The complaint also expressly alleged that appellees trafficked the Resorts **in Florida**. *E.g.,* Comp. ¶ 13 ("[Appellees'] websites are fully-interactive, have

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[4] *Rizack v. Starr Indem. & Liab. Co. (In re Grandparents.com, Inc.)*, 614 B.R. 625, 633 (Bankr. S.D. Fla. 2020) (citing *Citizens Property Ins. Corp. v. Perdido Sun Condo. Ass'n, Inc.*, 164 So. 3d 663 (Fla. 2015) and *Brown v. Nova Info. Sys.*, 903 So. 2d 968, 969 (Fla. 5th DCA 2005)).

robust internet e-business capabilities. They have worldwide reach on the internet and are fully accessible in Florida. Floridians can readily access [appellees'] websites and are able to book hotel accommodations in Cuba at more than 6,500 hotels, including the [Resorts]."); *id.* ¶ 14 ("With a few clicks, a Floridian can reserve a room using a U.S. credit card."); *id.* ¶ 15 ("[Appellees] promote their websites—and their interactive capabilities for the booking [of] hotel rooms at Cuban hotels, including the [Resorts]—on the internet, including to Floridians . . . [t]hrough their follow-up emails to Floridians . . . ."). Appellees had various and copious direct correspondence with persons they knew were located in Florida.

"The Florida Supreme Court has made explicit that a defendant's physical presence is not required to commit a tortious act in Florida." *Grupo Indus. Hotelero S.A.*, 2008 WL 4724495, at *6 (citing *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002)). Specifically, "'committing a tortious act' in Florida under section [48.193(1)(a)(2)] can occur through the nonresident defendant's telephonic, electronic, or written communications into Florida, as long as the plaintiff's cause of action arises from the communications." *Pathman v. Grey Flannel Auctions Inc.*, 741 F. Supp. 2d 1318, 1324 (S.D. Fla. 2010) (Isolated activity and maintaining a merely informational, non-interactive website accessible in Florida might be insufficient, but "[a]ctive internet solicitation may subject a defendant to personal jurisdiction."); *accord Renaissance Health Pub., LLC v. Resveratrol*

Partners, LLC, 982 So. 2d 739, 742 (Fla. 4th DCA 2008) (Sales to Florida residents through interactive websites were "sufficient to subject defendants to jurisdiction."). When Floridians researched reservations at Cuban hotels, including the Resorts, but did not make reservations, appellees sent them follow-up emails, urging them to make reservations and suggesting other attractions and hotels in the area. Even without the complaint's allegations of sales in Florida, its allegations of solicitations in Florida would have supported a Title III claim and tortious act jurisdiction over appellees, because their solicitations also constituted trafficking.

The complaint also adequately alleged that appellees' tortious conduct of advertising, facilitating, and selling room reservations at the Resorts was for their economic benefit, which constitutes trafficking under Title III.[5] Appellants' injury also properly was alleged to have been suffered in Florida, because appellants reside in Florida, where they have been deprived of compensation for appellees' trafficking of the properties without their permission. Comp. ¶ 43.

[5] The complaint alleged that appellees use three profit models: a merchant model; an agency model; and, for the Expedia Appellees, an advertising model. Comp. ¶¶ 48, 55. Under the merchant and agency models, appellees receive commissions and other revenue for facilitating the booking of hotel rooms. *Id*. Under the advertising model, appellees "offer travel and non-travel advertisers access to a potential source of incremental traffic and transactions through our various media and advertising offerings on trivago and transaction-based websites." *Id*. ¶ 48.

In sum, appellees' websites are accessible to Floridians, their marketing is aimed at making sales to Floridians, and their trafficking in the Properties has caused and is causing injury to appellants in Florida. Tortious act jurisdiction under § 48.193(1)(a)(2) was adequately alleged.

C. Minimum Contacts Exist and Due Process Is Satisfied

The complaint adequately and extensively alleged that appellees are subject to "doing business" and "tortious act" long-arm jurisdiction because they traffic the stolen properties in Florida through soliciting, advertising, and marketing aimed at and accessible to Floridians, and by selling reservations at the Resorts to Floridians. Appellees made no effort to rebut the complaint's jurisdictional allegations, which are legally sufficient, and demonstrate that due process plainly would not be offended by asserting personal jurisdiction over appellees.

The Supreme Court long ago recognized that a defendant's purposeful availment of the privilege of doing business in Florida satisfies due process. *Burger King v. Rudzewicz*, 471 U.S. 462, 473-74 (1985). Appellants' complaint left no doubt that appellees conduct business in Florida from which this case arises, targeting Floridians to promote, market and sell reservations at the Resorts, and reaching into Florida by sending Floridians follow-up emails until and after sales are made. *See, e.g., Walden v. Fiore*, 571 U.S. 277, 285 (2014) ("[I]t is the defendant's conduct that must form the necessary connection with the forum State

that is the basis for its jurisdiction over [the defendant]"). Appellees *themselves* reached into the forum state—purposefully availing themselves of the privilege of doing the business at issue in Florida—where they have been authorized and doing business for many years. *See World-Wide Volkswagen Corp. v Woodson*, 444 U.S. 286, 297 (1980). The volume of appellees' case-related contacts far exceeds that which has been sustained in leading cases. One simply may not market and sell products and services to Floridians without reasonably expecting to be sued in Florida on claims arising from or related to those activities.

Moreover, intentional torts also support the exercise of personal jurisdiction over a nonresident defendant who has no other contacts with the forum. *See Licciardello*, 544 F.3d at 1285 (citing *Calder v. Jones*, 465 U.S. 783, 790 (1984)). Appellees' Title III claims are intentional, statutory torts, committed in Florida.

The complaint's allegations also satisfied this Circuit's three-part, due process test, which asks: (1) whether the plaintiff's claims 'arise out of or relate to' at least one of the defendant's contacts with the forum (*see* Comp. ¶¶ 14, 15, 36, 39, (trafficking in Florida by marketing, soliciting and sending emails to Florida; selling reservations in Florida; and accepting payment from customers in Florida)); (2) whether the nonresident defendant 'purposefully availed' himself of the privilege of conducting activities within the forum state (*see id.* ¶¶ 15, 16 (having offices in Florida, and sending direct email communications into Florida soliciting

business that resulted in sales in Florida), thus invoking the benefit of the forum state's laws; and (3) whether the exercise of personal jurisdiction comports with "traditional notions of fair play and substantial justice" (appellees never as much as hinted that they would be burdened by litigating in Florida).

Further, because appellees traffic the hotels by advertising and selling reservations in Florida, Florida has a strong interest in hearing the case and protecting consumers from unlawful trafficking. Moreover, appellants, who are Florida residents, have an undeniable interest in litigating the case in their chosen forum in their home state. *E.g., Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355-58 (11th Cir. 2013) (quoting *Burger King*, 471 U.S. at 472-73).

In sum, the complaint adequately alleged that appellees reached into Florida, soliciting and making sales to Floridians through websites intended to make those sales, allegations that appellees could not (and didn't even try) to rebut. They are physically present in Florida with offices, divisions and employees that do the business in Florida from which this action arises. Their statutory tort injured appellants, who are Florida residents. Due process is satisfied.

II. IT WAS AN ABUSE OF DISCRETION TO DISMISS, WITHOUT LEAVE TO AMEND, THE FIRST COMPLAINT SUBMITTED FOR ADJUDICATION BELOW, A MERE SEVEN DAYS AFTER BRIEFING WAS COMPLETED

At the first time of asking, on the first motion to dismiss that was briefed and submitted for decision, the Order dismissed the complaint a mere seven days after briefing was completed, and committed further error by dismissing it without leave to amend or allowing appellants to complete pending jurisdictional discovery.

First, the Order misstated the law and the record stating that there was "no genuine factual dispute concerning personal jurisdiction because none of the parties submitted affidavit or declaration evidence in support of, or in opposition to, the exercise of personal jurisdiction over the Defendants." Order at 7. Appellants were not required to submit any affidavits or evidence in support of their jurisdictional allegations unless and until appellees carried their burden of submitting affidavits that rebutted the complaint's jurisdictional allegations. *E.g., Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). Appellees submitted no affidavits challenging anything the complaint alleged. Accordingly, the district court was required to take the complaint's jurisdictional allegations as true. Appellees' failure to challenge the alleged jurisdictional facts did, however, *concede them*, making any further

analysis unnecessary, because personal jurisdiction was appropriate as a matter of law based on the complaint's allegations.

Second, the Order further erred in "denying" appellants' "informal request for jurisdictional discovery," because appellants did not "request" leave to serve jurisdictional discovery, which they served of right and were pending when the Order was entered. What appellants did request was that if, and to the extent, the district court had questions as to the legal sufficiency of the complaint's personal jurisdiction allegations, appellants should have had the opportunity to obtain responses to that discovery before any ruling on the motions to dismiss.

After responding to substantially similar discovery requests in a pending, related case, the Expedia appellees recently had abandoned their jurisdictional defense.[6] They would have had to do the same thing below as soon as their responses came due, as appellants advised the court below in briefing the motion to dismiss. Evidencing an irresistible urge to sweep the docket, the Order ignored all these procedural facts and improperly entered what amounted to a final judgment that mischaracterized the state of the record and relief requested.

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[6] Expedia conceded personal jurisdiction in *Mata v. Expedia, Inc., et al*., No. 19-cv-22529-CMA, D.E. 107 (S.D. Fla. Mar. 3, 2020), a Title III case regarding different properties, arising from the same Florida activity by appellees that is at issue here.

Appellees argue that appellants were not diligent in seeking discovery. EB at 25; BB at 44. Not so. Under Fed. R. Civ. P. 26(d)(1), discovery could not have been sought until after the Rule 26(f) conference, which occurred on February 10, 2020. Despite a pandemic and an unprecedented lockdown that disrupted all aspects of life, including litigation, appellees and the lower court were fully aware that jurisdictional discovery was pending when the Order dismissed the complaint without leave to amend.

The Booking appellees cite *Henriquez v. El Pais Q'Hubocali.com,* 500 F. App'x 824, 828 (11th Cir. 2012), and *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1280-81 (11th Cir. 2009) to argue that appellants were not diligent in seeking discovery. Those cases are inapposite. In *Henriquez*, the plaintiffs never sought any jurisdictional discovery in the six months the motion to dismiss was pending. 500 F. Appx. at 828. In *Mazer*, the motion to dismiss was fully briefed for four months before the plaintiff made any effort to seek jurisdictional discovery. 556 F.3d at 1281.

Here, during and despite an unprecedented worldwide lockdown, appellants served jurisdictional discovery requests on May 22, 2020. That was 7 days after briefing was complete on a motion to dismiss filed April 10th. The Order dismissing and closing the case was entered 4 days later, on May 26th, with those discovery requests pending. That was 42 days after the motion to

dismiss was filed, and a mere 11 days after briefing was completed. The Order prevented appellants from obtaining responses to pending discovery requests that would have put the lie to appellees' denials of their voluminous Florida business activities that give rise to this case. This was an abuse of discretion. *See, e.g., Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984) (Dismissal without affording plaintiff an opportunity to seek reasonable discovery was premature and an abuse of discretion, particularly where plaintiff had advised the court that discovery would demonstrate personal jurisdiction.).

Third, the order dismissed the complaint without leave to amend based on the (incorrect) notion that "Plaintiffs have had multiple opportunities to plead jurisdiction and have failed to do so." Order at 8. Appellants' personal jurisdiction allegations were briefed and ruled on ***once***, in an order that denied leave to amend and closed the case. Appellees had been added as defendants on January 17, 2020, just over four months before the case was dismissed without leave to amend on the very first motion submitted for adjudication. Appellees cite *Kabbaj v. Obama*, 568 F. App'x 875, 879 (11th Cir. 2014), for the unexceptional proposition that a court is not required to permit a plaintiff further amendment after repeated failures to cure pleading deficiencies. Again, we ask, so what?

Pleading "deficiencies" do not, and cannot, mean anything other than defects identified in prior court orders on prior motions to dismiss. Those orders put a

plaintiff on notice of what the "deficiencies" are. Appellants here never had notice of any such deficiencies until the first Order on the first motion to dismiss closed the case. Moreover, here, virtually every issue is an issue of first impression, and there were not only no prior orders, but no definitive body of case law on any aspect of a Title III claim under the Act. In high contrast, *Kabbaj* involved deprivation of rights claims under 42 U.S.C. § 1983, claims under the Federal Torts Claim Act, 28 U.S.C. § 1346, and claims under the Privacy Act, 5 U.S.C. § 552a, as to all of which there are thousands of reported decisions, including decisions of the Supreme Court.

In *Brisson v. Ford Motor Co.*, this Court reversed a district court's *sua sponte* refusal to allow plaintiffs to amend their complaint, where they allegedly were on notice of deficiencies in the complaint because their counsel also was counsel in a related case that had been adjudicated. 349 Fed. Appx. 433, 435 (11th Cir. 2009). This Court held that "plaintiffs are ready, willing, and able to plead that they meet the . . . requirements, something the district court assumed, without asking, that they could not do." *Id*. As in *Brisson*, appellants here never were put on notice of "deficiencies" by any order prior to the Order that dismissed the complaint without leave to amend. Similarly, in *Bryant v. Dupree*, this Court reversed a district court's dismissal with prejudice for failure to correct

"deficiencies" in a complaint where no prior orders had given plaintiffs notice of any such "deficiencies." 252 F.3d 1161, 1164 (11th Cir. 2001).

In stark contrast, the *Kabbaj* complaint had been twice dismissed without prejudice, and those prior orders had given plaintiffs notice of deficiencies in the complaints, which they failed to cure on the third try. 568 F. App'x at 878-79. Here, there was no ruling on anything until the Order closed the case on the first motion to dismiss that was briefed and submitted for decision. Appellants had no notice of any deficiencies in the complaint, especially where appellees had made no effort to rebut any of its jurisdictional allegations by affidavit. *E.g., Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990) ("The district court must accept the facts alleged in the complaint as true, to the extent they are uncontroverted by the defendant's affidavits.").

Appellees argue that amendment would be futile, but because appellants never had actual notice of any "deficiencies," this theory is wholly inapplicable. As demonstrated above, the complaint's unrebutted jurisdictional allegations had to be taken as true and were legally sufficient. The Order failed to mention any other grounds for dismissal, let alone the purported futility of attempting to cure them, except for a makeweight footnote on its last page. *See* Order at 8, note 2.

Because nothing in the Order (including note 2) discussed who may possess a Title III claim or when they must have acquired it, this footnote came out of

nowhere and is mere dicta. It states "that it would be futile for Angelo Pou (and possibly for Enrique Falla) to amend their complaint because they do not appear to have actionable ownership interests." Order at 8, note 2. Even if its unspoken theory actually had been articulated, this statement could not have supported dismissal, let alone closing the case, because there were *three plaintiffs* below, *not two*, one of whom, Mario Del Valle, wasn't even mentioned. Further, as to the two plaintiffs it did mention, this statement's equivocal language—that amendment would be futile for one of the appellants, and possibly another—never could have constituted a holding or supported closing the case. It was dicta that "is not binding on anyone for any purpose." *Welch v. U.S.*, 958 F.3d 1093, 1098 (11th Cir. 2020).

III. APPELLANTS ADEQUATELY ALLEGED STANDING UNDER TITLE III OF THE HELMS-BURTON ACT

Appellees, and CLIA in their amicus brief, argue that appellants lack "Article III standing" to bring this action.[7] Standing requires that a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[7] Appellants object to attempts to constitutionalize standing in federal question cases. Standing is a justiciability rule based on the "case or controversy" requirement of Article III. Others include ripeness, exhaustion and mootness.

Under Title III, plaintiff's injury is not the Cuban government's confiscation of the Properties. Plaintiff's injury (the raison d'être for Title III), is appellees' trafficking in the Properties. The complaint adequately alleged "an invasion of a legally protected interest." Title III expressly makes trafficking in confiscated property a "legally-protected interest" for which it expressly provides a remedy.

First, appellees argue that appellants failed to plausibly allege any concrete injury. BB at 52 and EB at 29. This silly argument ignores the complaint's copious, legally sufficient allegations that appellees are subject to liability for trafficking the Properties. For example, the complaint alleged that:

> Together, the Cuban government, Blue Diamond, the Expedia Entities, and the Booking.com Entities have exploited and benefitted from the Del Valle, Falla, and Muniz families' properties without paying the rightful owners any compensation whatever. The Plaintiff Heirs now sue to right the defendants' unlawful trafficking in their property and for just compensation for themselves and persons who are in a similar situation.

Comp. at 3. The complaint alleged far more than this. *id.* ¶ 43 ("The Plaintiff Heirs never have given permission to defendants or anyone else to traffic in their Properties, and the defendants never have paid—nor have the Plaintiff Heirs ever received—any compensation for defendants' trafficking in the Properties."); *id.* ¶ 88 ("Defendants Expedia and Booking.com Entities have knowingly and intentionally used or benefitted, directly or indirectly, from the confiscated

properties by offering, for economic benefit, reservations at the Trafficked Hotels, which constitutes trafficking that violates Title III of the LIBERTAD ACT.”).

CLIA argues that the complaint failed to allege that appellees’ acts caused any concrete harm, or that appellees owe appellants any compensation. Stuff and nonsense. Trafficking stolen property without permission or compensation is actionable at common law, and is the precise wrong the Act exists to remedy. *Cf.* CLIA’s Amicus Brief (“AB”) at 4. Moreover, CLIA’s argument cannot blink away the express allegations quoted above.

In the related case of *Havana Docks Corp. v. Carnival Corp.*, 2020 WL 5517590, at *8 (S.D. Fla. Sept. 14, 2020), a district court of this Circuit declined to follow a Texas decision, *Glen v. Am. Airlines, Inc.*, 2020 WL 4464665(N.D. Tex. Aug. 3, 2020), on which CLIA (and appellees) rely. The *Havana Docks* court held that “allegations of profiting from the use of property that was expropriated without obtaining consent or paying adequate compensation to the original owner is sufficient concrete harm for standing purposes.” *Havana Docks,* 2020 WL 5517590, at *8. That decision was correct and should be endorsed here.

Second, Title III is solely aimed at traffickers (like appellees) who use or benefit from property that was confiscated. Thus, the injury in fact that appellants alleged is—and only can be—appellees’ trafficking in the Properties without appellants’ permission and without compensating them. That injury is not only

"fairly traceable" to appellees but is the proximate result of appellees' trafficking in the Properties. The Expedia Appellees and CLIA continue to run their misdirection play, arguing that appellants' injury was caused by the Cuban government's confiscation of the Properties. CB 16, 17; and EB 46. Wrong. Under Title III, appellants' injury is not the theft of the Properties but trafficking them.

Third, appellees wholly fail to address the self-evident fact that a favorable judicial decision awarding damages to appellants is intended to, and obviously will, redress appellees' failure to compensate appellants for trafficking their Properties. As such, appellants' injury unquestionably can be "redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. In sum, appellees' "Title III standing" argument is meritless and should be rejected.

Finally, appellees and CLIA seek support from this Court's recent decision in *Muransky v. Godiva Chocolatier, Inc.*, 2020 WL 6305084 (11th Cir. Oct. 28, 2020). That quest will prove fruitless. While noting that bare allegations of statutory violations often are insufficient to demonstrate standing on federal question claims, *Muransky* held that standing exists where the alleged statutory violations caused a type of harm historically recognized as actionable. *Id.* at *6.

In addition to adequately alleging a Title III violation and an actual, concrete, remediable injury resulting from it, the complaint expressly alleged actual injury from appellees' trafficking of the stolen Properties without seeking

appellants' consent or compensating them for that trafficking. American courts have long recognized that such infringement of a person's property rights is actionable as unjust enrichment. *Havana Docks*, 2020 WL 5517590, at *7. On the precise point in question, that court held that in enacting Title III, Congress sought to provide an effective remedy for a historically recognized property right, and to prevent "the subsequent unjust enrichment and economic exploitation of that property by foreign investors at the expense of the rightful owners." *Id.*.

The *Muransky* court stated that "[t]he fit between a traditionally understood harm and a more recent statutory cause of action need not be perfect." *Muransky*, 2020 WL 6305084, at *11. In this case it very nearly is. Appellants alleged "the kind of injury that 'has traditionally been regarded as providing a basis for a lawsuit.'" *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).

IV. APPELLANTS ADEQUATELY ALLEGED A LEGALLY SUFFICIENT CLAIM UNDER TITLE III OF THE ACT

Hopping aboard the footnote 2 dicta train, the Expedia Appellees demand that this Court address issues that were not addressed below or even mentioned in the Order, except insofar as they were hinted at by the drive-by dicta of footnote 2. Pursuant to *Citro Florida. Inc. v. Citrovale. S.A.*, 760 F.2d 1231, 1232 (11th Cir.1985), this Court declines to reach the merits of issues on which a district court did not rule. It should do so here, not only because the issues were not addressed

below, but because the case couldn't properly have been dismissed even if those issues had been addressed in the Order. In an abundance of caution, however, appellants next respond to the Expedia Appellees' arguments.

A. Appellants Adequately Alleged That They Acquired Their Title III Claims Prior to the Statute's Effective Date

Under Title III, "a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). All of the appellants were alive on March 12, 1996, when they stood to (and eventually did) inherit a claim to the stolen Properties, through lines of succession that the complaint also alleged. Comp. ¶¶ 19-22, 24-27, 29-31. No more was required.

But the complaint further alleged that "[s]ince its confiscation, and as of the time of filing this lawsuit, Mario Del Valle Sr., and subsequently the Del Valle Heir, have been rightful owners of the claim to the Del Valle Property which is being trafficked by Blue Diamond, and the Expedia and Booking.com Entities" (*id.* ¶ 40); "[s]ince its confiscation, and as of the time of filing this lawsuit, Laureano Falla Falla and Eugenio Crabb, and subsequently the Falla Heir, have been rightful owners of the claim to the Falla Property which is being trafficked by Blue Diamond, and the Expedia and Booking.com Entities" (*id.* ¶ 41); and "[s]ince its confiscation, and as of the time of filing this lawsuit, Carmen Muniz, and subsequently the Muniz Heir, have been rightful owners of the claim to the Muniz

Property which is being trafficked by Blue Diamond, and the Expedia and Booking.com Entities." *Id*. ¶ 42.

Nonetheless, the Expedia Appellees persist in asserting that "Plaintiffs' complaint lacks factual allegations from which one could draw a reasonable inference that the Plaintiffs inherited and now own a claim to the Properties[,]" EB at 32, and that even if it had, "Falla and Pou fail to state a cause of action under Title III because they do not allege that they acquired ownership of the claims to the Falla and Muniz Properties before March 12, 1996." *Id.* at 33. Balderdash!

As demonstrated above, Appellants adequately alleged their ownership interests under the Act. Title III expressly defines property to mean "any property . . . whether real, personal, or mixed, and any present, ***future, or contingent right***, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12)(A) (emphasis added). This definition makes clear that appellants, whose parents owned the Properties that the communist Castro regime confiscated, had "future or contingent rights" and actionable interests in the Properties when Title III was enacted.

More than a year ago, in August 2019, two decisions in pending, related cases expressly held and confirmed that this is all the Act requires. Expedia's persistence in ignoring those decisions should end here and now. "First, the plain language of the Act states that 'any person . . . that traffics in property which was

confiscated by the Cuban Government . . . shall be liable to any United States national who owns the claim to such property.'" *Havana Docks Corp. v. Carnival Corp.*, Case No. 19-cv-21724-BB, 2019 WL 8895241, at *4 (S.D. Fla. 2019) (Bloom, J.) (citing 22 U.S.C. § 6082(A)). The Act does not provide when trafficking has to occur, only that it occur while a party holds a claim to the property, and the complaint plainly alleged that appellants have held claims to the Properties since they were born. The *Havana Docks* court might as well have been responding to Expedia when it held that the defendant there had "incorrectly conflate[d] a claim to a property and a property interest." *Id.* at *4.

Expedia's theory was expressly rejected a second time in August 2019, in the related, pending case of *Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK, 407 F. Supp. 3d 1281, 1289 (S.D. Fla. 2019) (King, J.). The court there held that "[b]ased on contemporary dictionary definitions, Congress would have understood that a claim to confiscated property is substantially broader than a direct interest in such property." In sum, appellants adequately alleged legally sufficient, actionable property claims under Title III, and Appellees' arguments are without merit.

B. Appellants Adequately Alleged That Appellees' Trafficking Was "Knowing and Intentional"

Appellees argue that appellants failed to sufficiently allege that their trafficking was "knowing and intentional," as if Title III claims required bad intent.

EB at 37. They do not. This is a strict liability cause of action, a statutory tort with limited statutory defenses. It does not require bad intent or any improper mental state. It merely requires that trafficking not occur accidentally or unintentionally, in other words, that the trafficker acted volitionally or "on purpose." The complaint adequately alleged that appellees did just that.

First, the complaint repeatedly alleged that appellees have trafficked the Properties. *E.g.,* Comp. at 3 ("The Plaintiff Heirs now sue to right the defendants' unlawful trafficking in their property . . . ."); *id.* ¶ 1 ("The Plaintiff Heirs, on behalf of themselves and a class of similarly-situated persons, sue the Expedia and Booking.com Entities under the Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021, et seq. (the "LIBERTAD Act"), for unlawful trafficking in their confiscated property in Cuba."); *id.* ¶¶ 40-42 ("Since its confiscation, and as of the time of filing this lawsuit, [appellant's parent], and subsequently the [appellant] Heir, have been rightful owners of the claim to the [appellant's] Property which is being trafficked by Blue Diamond, and the Expedia and Booking.com Entities."); *id.* ¶ 43 ("The Plaintiff Heirs never have given permission to defendants or anyone else to traffic in their Properties, and the defendants never have paid—nor have the Plaintiff Heirs ever received—any compensation for defendants' trafficking in the Properties."); *id.* ¶ 88 ("Defendants Expedia and Booking.com Entities have knowingly and intentionally used or benefitted, directly or indirectly, from the

confiscated properties by offering, for economic benefit, reservations at the Trafficked Hotels, which constitutes trafficking that violates Title III of the LIBERTAD ACT.") (emphasis added); *id.* ¶ 90 ("The Plaintiff Heirs, in compliance with 22 U.S.C. §§ 6082 (a)(3)(B) and (a)(3)(D), provided notice to Expedia, Hotels.com L.P., Hotels.com GP, Orbitz, Booking.com, and Booking Holdings more than 30 days before joining those entities as defendants in this action. Notwithstanding this notice, those entities continue to traffic in the Cuatro Palmas and Memories Jibacoa.").

Second, "knowing and intentional" is part of the definition of "trafficking." *See* 22 U.S.C. § 6023(13)(A). Thus, when the complaint alleged that appellees have trafficked in the Resorts, it necessarily alleged trafficking that was "knowing and intentional." Nonetheless, the complaint also expressly alleged that appellees' trafficking was knowing and intentional. Comp. ¶ 88 ("Defendants Expedia and Booking.com Entities have knowingly and intentionally used or benefitted, directly or indirectly, from the confiscated properties by offering, for economic benefit, reservations at the Trafficked Hotels. . . .").

Moreover, appellees continued to traffic the properties after appellants put them on notice that they were about to be sued for trafficking under the Act. This plainly demonstrated knowing and intentional conduct. *See* Comp. ¶ 99 ("The Plaintiff Heirs, in compliance with 22 U.S.C. §§ 6082 (a)(3)(B) and (a)(3)(D),

provided notice to Expedia, Hotels.com L.P., Hotels.com GP, Orbitz, Booking.com, and Booking Holdings more than 30 days before joining those entities as defendants in this action. Notwithstanding this notice, those entities continue to traffic in the Cuatro Palmas and Memories Jibacoa.”).

Third, appellees were on notice since 1996 that they faced “the prospect of lawsuits and significant liability” for trafficking that would be “established irreversibly during the suspension period” of Title III:

> I will allow Title III to come into force. ***As a result, all companies doing business in Cuba are hereby on notice that by trafficking in expropriated American property, they face the prospect of lawsuits and significant liability in the United States***.
>
> Our allies and friends will have a strong incentive to make real progress because, ***with Title III in effect, liability will be established irreversibly during the suspension period and suits could be brought immediately when the suspension is lifted***. And for that very same reason, foreign companies will have a strong incentive to immediately cease trafficking in expropriated property, the only sure way to avoid future lawsuits.

President’s Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 32 Weekly Comp. Pres. Doc. 1265 (July 16, 1996) (available at www.govinfo.gov/content/pkg/WCPD-1996-07-22/pdf/WCPD-1996-07-22-Pg1265.pdf) (attached as Exhibit I to D.E. 96). President Clinton’s statement rendered appellees’ conduct knowing and intentional as a matter of law.

Fourth, the complaint alleged that appellants provided notice letters on August 7, 2019, which expressly notified appellees that they were about to be sued

for trafficking. As noted above, the complaint also alleged that appellees continued to traffic the Properties after receiving this notice, which alone would dispose of appellees' "intent" argument, even if Title III required more than merely volitional conduct, which it does not. Comp. ¶ 99. In sum, the complaint adequately alleged that appellees' conduct was knowing and intentional.

C. The "Incident to Lawful Travel" Exception Is Not Applicable Because it is an Affirmative Defense and Appellees Are Not Engaged in Transactions and Uses of Property That Are Incident and Necessary to Lawful Travel

The Expedia Appellees also argue that the complaint was required to allege a negative—that the "incident to lawful travel exception" does not apply, i.e., that appellees' online booking of rooms on the Properties (appellees' trafficking) falls outside the Lawful Travel Clause. EB at 39. This argument is based on a faulty premise—that the elements of a Title III claim include the *inapplicability* of that exception. As Expedia must concede, two district courts of this Circuit, in pending, related cases, rejected this theory in August 2019, holding that the "lawful travel" exception is an affirmative defense which a defendant must plead and prove. Those decisions were correct, and it's high time to lay Expedia's theory to rest.

In *Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK, 407 F. Supp. 1281, 1286 (S.D. Fla. 2019) (King, J.), the court held that "[b]ased on the text and structure of Helms-Burton, the Court holds that the lawful travel exception is an affirmative defense to trafficking that must be established by Carnival, not

negated by Plaintiff." Similarly, in *Havana Docks Corp. v. Carnival Corp.*, Case No. 19-cv-21724-BB, 2019 WL 8895241, *3 (S.D. Fla. 2019) (Bloom, J.), the court held that "[b]ased on the language of the Libertad Act, the Court agrees with the Plaintiff that the 'lawful travel exception' is an affirmative defense to trafficking . . . . Therefore, this exception must be established by Carnival and Plaintiff was not required to negate this exception in its Complaint."

Even if the argument had to made from the ground up, it is well-settled that "[a]n affirmative defense 'admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification, or other negating matters.'" *Boigris v. EWC P&T, LLC*, 2019 WL 5457072, at *2 (S.D. Fla. 2019) (quoting *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013)); *accord Losada v. Norwegian (Bah.) Ltd.*, 296 F.R.D. 688, 690 (S.D. Fla. 2013); *VP Props. & Devs. LLLP v. Seneca Specialty Ins. Co.*, 645 Fed. App'x. 912, 916 (11th Cir. 2016). For this reason, it has long been held that "[p]laintiffs are not required to negate an affirmative defense in their complaint." *Padilla v. Porsche Cars N. Am., Inc.*, 391 F. Supp. 3d 1108, 1112 (S.D. Fla. 2019) (quoting *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal citations omitted)).

The burden of pleading and proving an affirmative defense rests with the "one who claims its benefits"—the defendant. *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 93 (2008) Accordingly, a plaintiff is not required to allege the

non-existence of an affirmative defense. *Cunningham v. Yellowstone Capital LLC*, 2016 WL 11163899, at *2 (S.D. Fla. 2016); *accord Manfred v. Bennet Law*, PLLC, 2012 WL 6102071, at *2 (S.D. Fla. 2012) (In a Telephone Consumer Protection Act ("TCPA") case, "prior express consent is an affirmative defense, not an element of the claim[,]" and a "[p]laintiff need not plead that he did not give his prior express consent.").

"The touchstone for determining the burden of proof under a statutory cause of action is the statute itself." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1110 (11th Cir. 2008). Where a statute "exempt[s] otherwise illegal conduct by reference to a further item of proof . . . the burden of persuasion falls on the 'one who claims its benefits.'" *Meacham*, 554 U.S. at 93 (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)).

Here, we deal with a statutory exception to liability under Title III that carves out a limited, specific category of lawful conduct ("transactions and uses of property incident to lawful travel to the extent that such transactions and uses of property are necessary to the conduct of such travel") from otherwise unlawful conduct ("trafficking"). *See* 22 U.S.C. § 6023(13)(B)). This is far from unique, as other statutory schemes employ the same structure, which also compels concluding that this exception is an affirmative defense.

For instance, the TCPA makes using certain calling technology unlawful, except for calls made for emergency purposes or with the prior express consent of the called party:

> It shall be unlawful for any person within the United States . . . [t]o make a call (***other than a call made for emergency purposes or made with the prior express consent of the called party***) . . . .

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). In *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014), plaintiff alleged a TCPA violation and defendant argued consent. This Court held that the consent exception was an affirmative defense and, accordingly, that the burden was on the defendant to plead and prove that it applied. *Id.* at 1253.

Similarly, in *Meacham*, the U.S. Supreme Court addressed an exemption to the Age Discrimination in Employment Act (the "ADEA"). The Court noted that the "ADEA's general prohibitions against age discrimination . . . are subject to a separate provision . . . creating exemptions for employer practices otherwise prohibited under [various subsections of the ADEA]." *See 554* U.S. at 91 (internal citations omitted). The Court found that "[g]iven how the statute reads, with exemptions laid out apart from the prohibitions (and expressly referring to the prohibited conduct as such), it is no surprise that we have already spoken of the BFOQ and RFOA provisions as being among the ADEA's 'five affirmative defenses.'" *Id.* (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 11, 122

(1985)). The Court cited the "familiar principle that 'when a proviso . . . carves out an exception out of the body of a statute or contract those who set up such an exception must prove it.'" *Meacham*, 554 U.S. at 91 (quoting *Javierre v. Central Altagracia*, 217 U.S. 502, 508 (1910)).

In Title III, Congress listed the prohibited acts in its definition of trafficking, and then set forth an exception for a discrete, limited class of lawful conduct that otherwise would be prohibited by Section 6023(13)(A):

> (i) the delivery of international telecommunication signals to Cuba;
>
> (ii) the trading or holding of securities publicly traded or held, unless the trading is with or by a person determined by the Secretary of the Treasury to be a specially designated national;
>
> (iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel; or
>
> (iv) transactions and uses of property by a person who is both a citizen of Cuba and a resident of Cuba, and who is not an official of the Cuban Government or the ruling political party in Cuba.

22 U.S.C. § 6023(13)(B). In August 2019, in a related, pending case, the court held that "[b]y using the phrase 'except as provided in subparagraph (B)' immediately before describing the conduct that constitutes trafficking, Congress expressed a clear intent to make the travel provision an exception to unlawful trafficking." *Garcia-Bengochea v. Carnival Corp.*, Case No. 19-cv-21725-JLK, 407 F. Supp. 1281, 1286 (S.D. Fla. 2019) (King, J.)

Just as in *Osorio* and *Meacham*, Section 6023(13)(B) "exempt[s] otherwise illegal conduct by reference to a further item of proof" (i.e., provides an affirmative defense), and "the burden of persuasion falls on the one who claims its benefits." *Meacham*, 554 U.S. at 93. Title III's "incident to lawful travel" exception is an affirmative defense that appellants were not required to negate, and appellees' contrary theories are wholly without merit.

Even if the "incident to lawful travel" exception were not an affirmative defense and could properly be raised on a motion to dismiss, and even if the definition of this exception somehow could be wrapped around appellees' trafficking in the abstract, their invocation of it would have been unavailing. Appellees violated their OFAC licenses every hour of every day, by selling room reservations to tourists, which is expressly prohibited by the regulations that authorize their license. *See* 31 C.F.R. § 515.560(f) ("Nothing in this section authorizes transactions in connection with tourist travel to Cuba.").

The Resorts are all-inclusive beach vacation resorts designed for, and catering to, tourists. Virtually all of appellees' trafficking involved "tourist travel," which will vitiate their attempt to invoke the lawful travel exception as a matter of law. But even if this were not so, the question whether appellees' trafficking was incident and necessary to lawful travel would remain a fact-bound inquiry that was incapable of resolution on a motion to dismiss.

D. Appellants Adequately Alleged Their Claims to the Properties, Which Are in Fact "Property" Under Title III, Because the "Residential Purpose" Carveout in Title III Refers to Current—Not Pre-Confiscation—Uses of Confiscated Property

The Expedia appellees argue that appellants "fail to allege that the Properties were used for anything other than 'residential purposes' at the time they were allegedly confiscated." EB at 44. According to the Expedia appellees, because appellants referred to the Properties that were stolen from them as "houses" or "homes," the Expedia Entities argue that they somehow are not "property" under the Act because, as of March 1, 1996, they were not the subject of a certified claim or occupied by a Cuban official. Id. This argument is specious, because Title III doesn't say, much less mean, what appellees wish it did. It says this:

> (A) The term 'property' means any property . . . whether real, personal, or mixed, and any present, future, or contingent right, security, or other interest therein, including any leasehold interest.
>
> (B) For purposes of subchapter III of this chapter, the term 'property' does not include real property used for residential purposes unless, as of March 12, 1996—
>
> > (i) the claim to the property is held by a United States national and the claim has been certified under title V of the International Claims Settlement Act of 1949 . . . ; or
> >
> > (ii) the property is occupied by an official of the Cuban Government or the ruling political party in Cuba.

22 U.S.C. § 6023(12).

The plain language of Subsection (B)'s "residential purpose" carveout does not refer to pre-confiscation, residential uses of real property. It does not exclude "real property that ***was*** used for residential purposes," or "real property that ***formerly*** was used for residential purposes," or "real property that was used, ***prior to its confiscation***, for residential purposes." It excludes "real property used for residential purposes." *Id.* The word "used" is present tense, and this provision expressly provides that no Title III claim will lie as to confiscated property ***now being used*** as a residence, unless (1) a member of the Castro regime was living there on March 12, 1996, or (2) the claim is a certified claim held by a person who was a U.S. national on March 12, 1996. A hotel built on stolen property is not a residence, period, full stop, and the Court should decline appellees' invitation to improperly "add or subtract words from a statute." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009).

Even if the plain language of 22 U.S.C. § 6023(12) did not unambiguously state that the "residential purposes" carveout refers to the ***current use*** of trafficked property, any other construction would contradict Title III's other provisions and express intent—to punish traffickers in confiscated property, and not innocent people who might be living in such properties. *See, e.g., Patel v. U.S. Att'y Gen.*, 917 F.3d 1319, 1326 n.5 (11th Cir. 2019) ("[O]ne of the most basic interpretative canons [is] that a statute should be construed so that effect is given to all its

provisions, so that no part will be inoperative or superfluous, void, or insignificant."); *In re Coffman*, 766 F.3d 1246, 1250 (11th Cir. 2014) (applying canon requiring related statutes to be read *in pari materia* and "interpreted together, as though they were one law").

In enacting Title III, Congress made the following findings:

- The wrongful confiscation or taking of property belonging to United States nationals by the Cuban Government, and the subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development. [22 U.S.C. § 6081(2)];

- The Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals. [22 U.S.C. § 6081(5)];

- This "trafficking" in confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban Government and thus undermines the foreign policy of the United States . . . . [22 U.S.C. § 6081(6)]

These findings demonstrate express congressional concern over foreign investors becoming involved in joint ventures with the Castro regime to exploit confiscated property. There is no better example of this than building a hotel on stolen beachfront property and trafficking that property online, which is exactly what happened here. In view of these findings, Congress stated that "[t]o deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the

courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures." 22 U.S.C. § 6081(11).

To exclude property that ever was used for residential purposes prior to confiscation would be inconsistent with the Act's language and history and would undermine congressional intent to deter trafficking in confiscated property. Thus, even if 22 U.S.C. § 6023(12) did not unambiguously carve out only property currently used for residential purposes, Title III's findings and stated purpose would require it to be so construed.

CONCLUSION

The order on appeal erroneously dismissed without leave to amend on the first motion to dismiss submitted for decision below. The unrebutted allegations in the complaint demonstrated that the exercise of "doing business in Florida" and "tort in Florida" personal jurisdiction over appellees was (and is) proper.

The complaint also adequately alleged a legally sufficient Title III claim for appellees' unlawful trafficking of the Properties in Florida through the solicitation and sale of reservations at the Resorts to Floridians in Florida.

Even if the order on appeal had not erroneously denied personal jurisdiction, it would have been (and was) an abuse of discretion to deny appellants answers to their pending discovery requests before ruling, and to preemptively bar a motion for leave to amend.

For all these good and sufficient reasons, appellants respectfully request that the Court reverse the order and reinstate the complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Appellants timely filed an unopposed motion for additional pages in this consolidated reply brief, which replies to two answer briefs and one amicus curiae brief. This brief contains 10,068 words, which exceeds by 3,528 words the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) for a single reply brief, excluding those parts that 11th Cir. R. 32-4 exempts. Appellants' timely motion for additional pages remains pending, and appellants were unable to find a rule extending the deadline to file this brief while that motion is pending. Consequently, appellants timely submit and lodge this consolidated brief, and respectfully request leave to file separate briefs if the Court were to deny their motion for additional pages.

This brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Office 365 Pro Plus and 14-point Times New Roman type style.

/s/ Andres Rivero
Andres Rivero

CERTIFICATE OF SERVICE

I CERTIFY that on January 6, 2021, I electronically filed this document with the Clerk of Court using CM/ECF. I also certify that this document is being served today on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Andres Rivero
Andres Rivero